No. 9916

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

MISCELLANEOUS. PAGE

STATUTES.

TEXTS.

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BRIEF OF APPELLEE.

Statement of Facts.

The statement of facts set forth in appellant's opening brief (pp. 1-5) is incomplete and is so insufficient as to be misleading to this Court. Appellee, therefore, sets forth hereinafter its counter-statement of facts, as disclosed by the record.

In 1931, the "Monolith Committee" was formed to represent the stockholders of Monolith Portland Cement Company and Monolith Portland Midwest Company. Appellant dominated and controlled such Committee and served as its chief investigator. [R. 135, 136, 137, 466].

Shareholders of the Monolith Companies were solicited by the Committee under the direction of appellant to advance 50¢ for each share of their holdings to raise funds to prosecute a civil action for damages, which action resulted favorably to the shareholders and as a result of which a settlement of the judgment was made in the

amount of $225,000 [R. 469, 472]. Appellant was the underwriter of the original Monolith issues of securities, underwriting such issues in the amount of one-and-one-half million dollars under the name of his company, W. J. Shaw & Company [R. 466]. The stock of the Monolith Companies had value, which value immediately and substantially increased after the judgment secured in the civil litigation [R. 159].

Thereafter, and following the settlement of the civil action, appellant and Frank S. Tyler prepared or caused to be prepared what was known as the Frank S. Tyler Partnership Agreement. This agreement provided, among other things, that a mining partnership should be formed and Tyler should convey to or hold in trust for the partnership, options to purchase certain mining properties known as the McKisson, Grand Prize, and Mineral Lode [R. 482, 142, 143, 277, 281]. Tyler was indicted herein with appellant and pleaded *nolo contendere* as to the sixteen counts of the indictment [R. 110].

After the preparation of the Tyler Partnership Agreement, shareholders of Monolith Companies were solicited to exchange their Monolith holdings, or to turn in their shares at an agreed valuation, and were later to receive stock in a mining company to be formed. The shareholders of the Monolith Companies would sign the Tyler Agreement and deliver their shares, and sometimes cash, to the solicitors [R. 141, 142, 143]. The Tyler Agreement was dated February 6, 1934 [R. 482], and Consolidated Mines of California, a California corporation, was incorporated on September 19, 1934 [R. 483].

Appellant completely dominated and controlled the activities of the Monolith Committee, the Tyler Partnership and Consolidated Mines of California. He employed solicitors

to contact shareholders, received Monolith stock and the money collected by the solicitors, used his office as headquarters for the Monolith Committee, the Tyler Partnership and Consolidated Mines of California [R. 136, 137, 485]. The deposit of Monolith stock was first solicited for the Tyler Partnership, and later in exchange for the stock of Consolidated Mines of California [R. 137, 140, 141, 147]. Individuals employed by appellant further contacted Monolith shareholders to buy the stock of Consolidated Mines of California, and these individuals called upon at least twenty-five hundred holders of Monolith stock [R. 141, 184]. The solicitation to switch holders of the Monolith stock into the stock of Consolidated Mines of California was not confined to the State of California, but solicitations for exchanges and sales were made to residents of the State of Oregon and within the State of Oregon [R. 128, 162, 187, 262, 264, 269].

As appears from the entire record, the United States mails were extensively used in connection with the solicitation to exchange Monolith stock for the stock of Consolidated Mines of California, to sell the stock of Consolidated Mines of California, and to deliver such stock certificates to purchasers. Form or circular letters were directed to the prospects and were prepared by appellant and his associates or under the direction of appellant [R. 335]. Stenographers chosen and employed by appellant, as a regular part of their duties and in the regular course of business, prepared correspondence dictated by appellant and others in his office directed to prospects and to shareholders of Consolidated Mines of California [R. 336, 337, 355], assisted in the preparation of form or circular letters [R. 337], forwarded certificates for the stock of Consolidated Mines of California by registered mail [R. 362].

and otherwise performed their duties under direction of appellant [R. 361].

After the incorporation of Consolidated Mines of California by attorneys employed by appellant [R. 484] and after a permit had been secured from the Corporation Commissioner of the State of California for the issuance of certain stock of the corporation, stock authorized by such permit eventually was purchased by the investors named in Counts 14, 15 and 16 of the indictment.

The record discloses that appellant dominated Frank S. Tyler. By a so-called profit agreement dated July 1, 1935, between appellant and Tyler [R. 483], appellant received an assignment from Tyler of an 80 per cent interest in any and all net income to be realized from the consideration received by Tyler from the partnership agreement and from the net capital stock Tyler received as his 40 per cent interest in Consolidated Mines of California [R. 544, 545]. The agreement further provided that stock of Consolidated Mines of California to be issued to Tyler was to stand on the books of that company in his name, but that Tyler would authorize the transfer of said stock to appellant or his nominees [R. 545]. The income tax returns of Tyler for the years 1935 and 1936 indicate the receipt of salaries, wages and share of profits from the sale of stock as paid Tyler by appellant [R. 325, 326]. Appellant was authorized to and did sign checks upon the bank account of Tyler [R. 294], but Tyler was not authorized to sign checks upon the bank account of appellant [R. 349].

The rental for offices used by Consolidated Mines of California was paid by appellant individually [R. 305]. Appellant exercised full control in the securing of a bond

and lease upon the mining properties of Grand Prize and Mineral Lode, entering into such bond and lease as agent for Consolidated Mines of California [R. 204, 205, 207]. Appellant further entered into agreements for the securing of mining rights upon other properties and signed the agreements to secure such rights on behalf of Consolidated Mines of California [R. 210, 211, 212]. After leases for such mining properties had been made by appellant, appellant decided which property should be worked [R. 234]. Difficulties in connection with the attempted operations were detailed to and discussed with appellant [R. 238-242] and appellant directed the shipping of the small amount of ore which was taken from the operations of properties worked by Consolidated Mines of California [R. 245].

The decision to form Consolidated Mines of California was made by appellant and he formulated the entire procedure to form such corporation and solicit funds to "get into production and start making good money within ninety days" [R. 400, 401].

Financial records kept by appellant (in the name of Tyler) disclose that in connection with the purchases, sales and trades of the Monolith stock and the stock of Consolidated Mines of California for the years 1934, 1935, 1936 and 1937, appellant withdrew the sum of $137,-043.61 and during the same period deposited a total of $88,197.24, or an excess of withdrawals over deposits in the sum of $48,846.37 [R. 392]. During the same period, the net profits from the sales of Monolith stock, Consolidated Mines stock sold for cash, and cash taken in on the Tyler Agreement were, according to the books of appellant, $72,802.17 [R. 394].

No registration statement was at any time filed with the Securities and Exchange Commission for the stock of Consolidated Mines of California [R. 268, 544].

Appellant was specifically advised by his attorney in June, 1936, that the stock of Consolidated Mines of California was not exempt from registration under the provisions of the Securities Act of 1933 [R. 525-528, 537-538].

The records of appellant disclose that during the period 1934-1937, expenditures at the mines which were attempted to be operated by Consolidated Mines of California totaled $48,611.09 [R. 392]. This sum represented part of the receipts from the sales of the stock of Consolidated Mines of California and of the sales of Monolith stocks secured in exchange for the stock of Consolidated Mines of California [R. 392]. Appellant testified that Consolidated Mines of California was indebted to him personally in the sum of $37,000.00 [R. 551].

The transactions of the investor witness Homer J. Arnold named in Count 14 of the indictment were had with appellant. As a result of discussions with appellant, this investor witness agreed to and did purchase 250 shares of the stock of Consolidated Mines of California. He thereafter received his stock certificate for 250 shares through the United States mails [R. 384, 473-475].

The investor witness Regina Woodruff named in Count 15 of the indictment testified that years prior to the transactions here involved, she had purchased Monolith stocks through the office of appellant. She called the office of Consolidated Mines of California and requested, by telephone, to speak with Mr. Tyler. She was informed that Mr. Tyler was not present but that she could speak with Mr. Shaw. She held a conversation with the man iden-

tified as Mr. Shaw, and as a result thereof, agreed to exchange her Monolith stocks for that of Consolidated Mines of California. Following this telephone conversation, she received through the United States mails certificate No. 741 for 30 shares of the stock of Consolidated Mines of California [R. 350-352].

The investor witness Eva M. Goodrich named in Count 16 of the indictment testified that she was the owner of stock in Monolith Portland Midwest Company and that she traded such stock for shares of Consolidated Mines of California. The record is silent regarding the person with whom she dealt. She testified that she received her certificate for the 18 shares of Consolidated Mines of California stock through the United States mails [R. 265, 383].

During the year 1936, Securities and Exchange Commission, an agency of the Government of the United States, having reasonable grounds to believe that the provisions of Sections 5 and 17 of the Securities Act of 1933 were being violated in connection with the sale of securities of Consolidated Mines of California, a corporation, directed that an investigation be instituted and thereupon designated one Milton V. Freeman as an officer to conduct such investigation, and empowered Freeman to administer oaths and affirmations, to subpoena witnesses and to take evidence.

On July 17, 1936, Freeman called appellant to appear before him and appellant appeared voluntarily and without subpoena. Appellant was duly sworn by Freeman, pursuant to the powers granted Freeman by Securities and Exchange Commission. After ascertaining the name and address of the defendant, Freeman advised appellant con-

cerning his constitutional privilege against self-incrimination. Appellant thereafter, on July 20, 1936, and September 2, 1936, reappeared before Freeman and was examined concerning his connection with the affairs of Consolidated Mines of California and the Stockholders Protective Committee of the Monolith Portland Cement Company. Appellant was at all times during the course of said examinations represented by counsel, and stenographic transcripts of his testimony were taken. At no time during the course of the examinations did appellant claim his privilege against self-incrimination, although he was advised concerning his rights when first sworn and was reminded of those rights upon each subsequent day upon which his testimony was taken. Every effort was made by Freeman to make clear to the defendant the existence of his constitutional privilege against self-incrimination [R. 93, 94, 95].

The appearance of appellant before Freeman was at a time approximately two-and-one-half years prior to the return of the indictment of appellant and approximately two years prior to the decision of this Court in the case of *Consolidated Mines of California, et al., v. Securities and Exchange Commission,* 97 Fed. (2d) 704, decided June 30, 1938.

Appellant's promotional efforts met the inevitable end. The mine at which operations were attempted closed down in December, 1937, and until the time of appellant's trial, only assessment work and cleaning out of the tunnels was performed [R. 522]. Receipts from ore sales for the period 1934-1937 totaled only $958.71 [R. 392]. The record is silent as to any dividends paid and as to any value whatsoever for the stock of Consolidated Mines of California.

Statement of the Case.

An indictment containing seventeen counts was returned against appellant in the United States District Court for the Southern District of California, Central Division, on December 13, 1939. Counts 1 to 13, inclusive, charged appellant and Frank S. Tyler with violations of the mail fraud statute (Title 18, U. S. C., Section 338); Counts 14 to 16, inclusive, charged appellant and Tyler with violations of Section 5(a)(2) of the Securities Act of 1933 (Title 15, U. S. C., Section 77e(a)(2)—*note:* the caption of the indictment erroneously designated Section 5(a)(2) of the Securities Act of 1933 as Title 15, U. S. C., Section 77q(a)(2)); Count 17 of the indictment charged violations of the conspiracy statute (Title 18, U. S. C., Section 88).

Thereafter, appellant attacked the indictment by demurrer and also filed a plea in abatement thereto. The demurrer was sustained as to Count 17 of the indictment and overruled as to the first sixteen counts. The plea in abatement demanded that the indictment be quashed, but, as claimed by appellant (opening brief, p. 7), the plea in abatement did not demand that an issue be tried before a jury [R. 70-75]. The plea in abatement was denied by the sustaining of a demurrer of the Government thereto.

After lengthy trial upon the issues presented by the first sixteen counts of the indictment, the jury returned a verdict of not guilty in favor of appellant as to Counts 1 to 13, inclusive, and a verdict of guilty as to Counts 14

to 16, inclusive. Appellant's motion for new trial was denied and appellant was sentenced to six months imprisonment upon each of the three counts upon which the verdict of guilty was returned, the sentence to run concurrently.

Each of the certificates of stock of Consolidated Mines of California, described in Counts 14, 15 and 16 of the indictment, were carried by the United States mails from one address in Los Angeles to another address in Los Angeles, for delivery to the purchasers thereof. Each certificate was signed by H. L. Wikoff, President, and Frank S. Tyler, Secretary, of Consolidated Mines of California. Each certificate was retransferred upon the books of Consolidated Mines of California and re-issued to the purchasers thereof, as named in Counts 14 to 16, inclusive, from stock then registered in the name of Frank S. Tyler.

The Question Presented by This Appeal Is:

Certificates of stock of a California corporation, as part of an interstate distribution, were carried by the United States mails for the purpose of sale and delivery after sale from one address within Los Angeles County to another address within the same county. The certificates so carried were retransferred by the corporation upon its records from stock previously registered upon its records in the name of an individual. The corporation was completely dominated and controlled by appellant, who was neither an officer nor a director of the corporation. Appellant and the individual in whose name the stock was previously registered directly participated in sales of the stock of the corporation and a portion of the proceeds from such sales was used for the benefit of the corporation. No registration statement for the stock of the corporation was filed with Securities and Exchange Commission. Appellant claims that the stock of the corporation sold was exempt from registration as the stock had theretofore been issued by the corporation to an individual, and was the "personally owned stock" of such individual. The individual in whose name such stock was registered and from whom such stock was transferred to the purchasers named in the indictment, was employed by appellant, dominated and controlled by appellant, and subject to the orders and directions of appellant. Appellant wilfully proceeds to sell and cause the sale and delivery after sale of the stock of the corporation.

Should the conviction of appellant for violation of the provisions of Section 5(a)(2) of the Securities Act of 1933 (Title 15, U. S. C., Section 77e(a)(2)) be upheld?

Summary of Argument.

I.

The Demurrer to Counts 14, 15 and 16 of the Indictment was Properly Overruled.

II.

The District Court Properly Sustained the Demurrer of the Government to the Plea in Abatement of Appellant.

(a) Appellant's Appearance and Testimony Before an Examiner of Securities and Exchange Commission Granted Appellant No Immunity as to the Matters about Which He Testified.

(b) The Production by Consolidated Mines of California of Its Books and Records under the Compulsion of a Subpoena Granted No Immunity to Appellant.

(c) Section 22(c) of the Securities Act of 1933, Insofar as it Requires a Person to Claim His Privilege, After He Is Called and Asked to Testify, Is Constitutional and Is Not in Violation of the Fifth Amendment to the Constitution of the United States.

(d) The District Court Properly Ruled That There Was No Issue to be Determined by a Jury as to Whether Appellant Was Entitled to Immunity.

III.

Appellant Cannot Here Question the Sufficiency of the Evidence as No Exception Was Taken to the Overruling of the Motion to Dismiss, at the Conclusion of the Government's Case, Nor Was Such Motion at Any Time Thereafter Renewed by Appellant.

(a) The Burden Is Upon the Appellant to Establish an Exemption from the Provisions of Section

5(a)(2) of the Securities Act of 1933. No Such Exemption Was Established.

(b) The Evidence That the Mailing of the Certificates of Stock Was in the Regular Course of Business of Appellant and Under His Direction Was Sufficient.

IV.

The Action of the Corporation Commissioner of the State of California in Issuing a Permit or Permits to Consolidated Mines of California, a California Corporation, to Issue Its Stock Is Immaterial and Irrelevant in a Prosecution for Violation of the Provisions of Section 5(a)(2) of the Securities Act of 1933.

(a) The Power to Regulate Commerce and the Use of the Mails Remains Free from Restrictions and Limitations Arising or Asserted to Arise by State Laws.

V.

Personally Owned Stock, As Such, Is Not Exempt From the Registration Provisions of the Securities Act of 1933 and the Instruction of the Trial Court to the Jury That It Was Immaterial That the Stock Sold Was or Was Not Personally Owned, Was Correct.

VI.

The Entire Record Must Be Considered upon This Appeal.

ARGUMENT.

I.

The Demurrer to Counts 14, 15 and 16 of the Indictment Was Properly Overruled.

Appellant asserts (opening brief, p. 17) that Counts 14, 15 and 16 of the indictment allege facts that show no crime was committed, as such counts allege an intrastate mailing of stock of a California corporation within the State of California. Appellant states that the Securities Act of 1933 specifically eliminates any mailing of stock of a corporation organized in a State and doing business within that State.

A casual examination of the Securities Act of 1933 discloses that the Act contains two alternative jurisdictional phrases, to-wit, the phrase "means or instruments of transportation or communication in interstate commerce" and the further jurisdictional phrase, "or by the use of the mails." See opinion of Judge St. Sure in *Securities and Exchange Commission v. Timetrust, Inc., et al.* (D. C. Calif.), 28 F. Supp. 34, and authorities cited therein.

The argument of appellant regarding the use of the mails in an intrastate mailing by a domestic corporation is possibly directed to the provisions of Section 3(a)(11) of Securities Act of 1933, which provides:

> "Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person

resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory." [See Appendix, p. 3.]

The provisions of Section 3, however, apply to exempted securities. This section does not, as appellant claims, show an intent on the part of Congress to exempt all local transactions in which the mails are used. It shows an intent to exempt only the use of the mails, where *the entire issue* is sold within the State by persons meeting the prescribed qualifications.

Counts 14, 15 and 16 of the indictment allege that no exemption from registration was available for the stock of Consolidated Mines, and as against demurrer, such allegation in the indictment must be taken as true. (See *United States v. Schmauder* (D. C. Conn.), 258 F. 251; *United States v. Doremus* (D. C. Tex.), 246 F. 958; *Knoell, et al, v. United States* (C. C. A. 3), 239 F. 16 (app. dis. 246 U. S. 648).)

This Court has held, in the case of *Woolley v. United States* (C. C. A. 9), 97 F. (2d) 258 (cert. denied, 305 U. S. 614, 59 S. Ct. 73, 83 L. Ed. 391) that an indictment need not set forth myriad details or satisfy every objection which human ingenuity may devise, but is sufficient if it charges every substantial element of offense and apprises accused of charge in such manner that he can prepare defense without being taken by surprise and be assured of protection against another prosecution for the same offense.

In fact, the allegation contained in Counts 14, 15 and 16 that no exemption from registration was available, was unnecessary. The Supreme Court in the case of *Edwards v. United States,* 312 U. S. 473, 61 S. Ct. 669, 85 L. Ed. 563, specifically held that an indictment charging conspiracy to violate the Securities Act of 1933 by selling unregistered securities, is not insufficient in failing to charge that the securities sold were not of the class exempted from registration under the Act and the Rules and Regulations thereunder.

The District Court properly held that Counts 14, 15 and 16 charged an offense and properly overruled the demurrer thereto of the appellant.

II.

The District Court Properly Sustained the Demurrer of the Government to the Plea in Abatement of Appellant.

Appellant (opening brief, pp. 48-56) argues as follows:

(a) Appellant's appearance and testimony before an examiner of Securities and Exchange Commission granted appellant immunity as to matters about which he testified.

(b) The production by Consolidated Mines of California of its books and records under the compulsion of a subpoena granted appellant immunity.

(c) Section 22(c) of the Securities Act of 1933, in so far as it attempts to require a person to claim his privilege after he is called and required to testify, is unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States.

(d) The District Court erred in denying to appellant a trial by jury on the issue of whether he was entitled to immunity.

A detailed discussion of each of the cases cited by appellant in alleged support of the foregoing contentions will not be made herein. Suffice it to say, the authorities cited by appellant do not sustain the contentions of appellant as applied to the facts of the case at bar.

(a) Appellant's Appearance and Testimony Before an Examiner of Securities and Exchange Commission Granted Appellant No Immunity as to the Matters About Which He Testified.

Appellant does not herein claim that he appeared before an examiner of Securities and Exchange Commission by reason of a subpoena or that he was requested or compelled to testify after having claimed his privilege against self-incrimination. The record discloses the contrary, to-wit, that appellant voluntarily and without subpoena appeared before the examiner and, after being duly sworn, was advised by the examiner concerning his constitutional privilege against self-incrimination. Such admonition was thereafter repeated to appellant upon two subsequent appearances. Appellant at all times was represented by counsel and at no time, during the course of the examinations, did appellant claim any privilege against self-incrimination [R. 93, 94, 95]. It must be assumed that appellant and his attorney decided the interests of appellant would be served best by the voluntary testimony of appellant before the examiner, even, in fact, if such testimony should be incriminating. Appellant at no place in his brief, claims that he was not expressly advised that he need not answer any questions which would tend to incriminate him or subject him to a penalty or forfeiture.

The learned Judge of the District Court, in sustaining the demurrer of appellee to the plea in abatement, concisely sets forth the facts and properly states the established law as to the contention of the appellant, as hereinbefore set forth [R. 97-103]. (*United States v. Shaw, et al,* 33 F. Supp. 531.)

Section 22(c) of the Securities Act of 1933 provides as follows:

> "No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause, or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing *concerning which he is compelled, after having claimed his privilege against self-incrimination,* to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying." (Italics added.) [See Appendix, p. 5.]

The provision of this statute that appellant must have claimed his privilege against self-incrimination, is plain and unambiguous. If any defendant considered that answering a question propounded while he was testifying would violate his constitutional rights, it was incumbent on him at the time to assert his privilege. (*Securities and Exchange Commission v. Torr, et al* (D. C. N. Y.), 15 F. Supp. 144.)

The action of appellant in voluntarily testifying before an examiner of Securities and Exchange Commission, without any claim or assertion of his constitutional privilege of self-incrimination, is on all fours with that of the appellant in the case of *Vajtauer v. Commissioner of Im-*

migration, 273 U. S. 103, 113, 47 S. Ct. 302, 71 L. Ed. 560, wherein Chief Justice Stone stated (page 113 of 273 U. S.):

> "Throughout the proceedings before the immigration authorities, he did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought. . . . The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it. . . . This conclusion makes it unnecessary for us to consider the extent to which the Fifth Amendment guarantees immunity from self-incrimination under State statutes or whether this case is to be controlled by Hale v. Henkel, 201 U. S. 43; Brown v. Walker, 161 U. S. 591, 608; compare United States v. Saline Bank, 1 Peters 100; Ballmann v. Fagin, 200 U. S. 186, 195."

Appellant in his appearances before the examiner of Securities and Exchange Commission, was specifically advised of his right to claim protection guaranteed under the Fifth Amendment to the Constitution. There was no requirement upon the Government so to advise appellant. In *Thompson, et al., v. United States* (C. C. A. 7), 10 F. (2d) 781, the authorities are reviewed and it is stated as follows (p. 784):

> ". . . As to the Fifth Amendment, the only clause which defendant may invoke reads: 'No person * * * shall be *compelled* in any criminal case to be a witness against himself.'
>
> "[6] Attention must be focused on the word 'compelled.' While Thompson could not be 'compelled' to be a witness against himself, he could *voluntarily*

offer his books and papers and take the stand. To deny one the right voluntarily to testify in his own behalf would be to deny the innocent a more valuable right than the one which protects him against being compelled to be a witness against himself. While the government may practice no deception, fraud, or duress upon the accused in order to obtain possession of evidence, it was not required to advise him of his right to claim (or his right to waive) the protection guaranteed under the Fifth Amendment. Wilson v. United States, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090; Powers v. United States, 223 U. S. 313, 32 S. Ct. 281, 56 L. Ed. 448; Knoell v. United States, 239 F. 21, 152 C. C. A. 66; United States v. Wetmore (D. C.), 218 F. 227.

"In such a situation as confronted Thompson, it was for him to decide whether he would be helped or hurt by refusing to produce the evidence demanded by the subpoena. In his dilemma, it seemed best to seek the advice of counsel. He did so. Thereafter he took the position that his employees should not only respond to the subpoena and produce the documents, but he volunteered to aid in the investigation and to appear himself before the grand jury. That he waived his privilege, or, to put it in another way, exercised his option (Wigmore on Evidence [2d Ed.] §2268), to appear voluntarily, is a conclusion concerning which we have no doubt."

Appellant contends that the request of the examiner of Securities and Exchange Commission that he appear and testify, even though such request was not accompanied by a subpoena, is sufficient to indicate that appellant was compelled to testify. Assuming that the request of the examiner imported, for this purpose, as much compulsion

as a subpoena, the plea in abatement fails to allege facts sufficient to show that appellant was compelled to testify. Merely to compel a witness to attend is not to compel him to testify. (*United States v. Kimball* (D. C. N. Y), 117 F. 156.)

A witness cannot claim his privilege until he has been sworn. (*United States v. Kimball, supra.*)

Therefore, there can be no prior compulsion and no resultant grant of immunity. (See *Sherwin v. United States,* 268 U. S. 369, 69 L. Ed. 985, 45 S. Ct. 517.)

Appellant asserts, broadly, that the mere testifying itself grants appellant an immunity from prosecution and argues that such assertion is supported by the case of *Counselman v. Hitchcock,* 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110. An examination of the *Counselman* case, however, discloses that it does not sustain the contention of appellant. Counselman was summoned before a Federal Grand Jury investigating certain alleged violations by officers of certain railroads charged with giving rebates in violation of the Interstate Commerce Act. He refused to answer questions as to whether he had received, or knew of any officer of the companies granting, any shippers of merchandise rates less than the traffic or open rate, stating that his answers might criminate him, pleading his constitutional immunity. Mr. Justice Blatchford, in the opinion of the Court, at page 562 of 142 U. S., states:

> "The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime."

And, at page 566 of 142 U. S., further and in quoting from the opinion of Chief Justice Marshall in *United States v. Aaron Burr,* 25 F. Cas. No. 14,692a:

> " 'It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws.' "

It will thus be observed that the Supreme Court in the *Counselman* case throughout focuses attention upon the word "compelled" as was done so forcefully in the case of *Thompson, et al. v. United States, supra.*

It should be further noted, however, that the statute under interpretation in the *Counselman* case did not contain a similar proviso to that contained in Section 22(c) of the Securities Act of 1933, requiring a claim of privilege by the witness against self-incrimination.

The cases cited by appellant (opening brief, pp. 48-56) do not hold that it is unconstitutional for a statute to withhold the privilege unless claimed. The statutes under consideration in these cases expressly conferred the immunity even though the witness did not claim it, and the courts were careful to point out that they would have a different situation before them if the statute required that the witness claim the immunity at the time he was compelled to testify.

For example, appellant (opening brief, pp. 50-51) quotes at length from *United States v. Goldman* (D. C. Conn.), 28 F. (2d) 424, wherein the statute under con-

sideration was a section of the National Prohibition Act, which did not require that the witness claim his constitutional privilege at the time he was compelled to testify. The distinction between this statute and Section 22(c) of the Securities Act was clearly recognized by the Court, which stated (p. 436):

> "If amnesty were to be available only to those who protested, it would have been a simple matter for the Congress to have added to Section 30 the following language:
>
> "'But no person shall be entitled to the benefits hereof unless he shall before testifying, declare to the court his refusal to testify on the ground of self-incrimination.'"

Section 22(c) of the Securities Act was under consideration in the case of *Edwards v. United States* (C. C. A. 10), 113 F. (2d) 286. The Circuit Court affirmed the conviction in the District Court, which affirmance, however, was reversed by the Supreme Court in the case reported in 312 U. S. 473, 61 S. Ct. 669, 85 L. Ed. 563. The opinion of the Supreme Court will be discussed hereinafter. It is believed that such opinion of reversal does not in fact modify or overrule a pronouncement of the Circuit Court of Appeals. In the opinion by Judge Bratton, at pages 288-289, it is stated:

> "Section 22(c) of the act provides that no person shall be excused from testifying or producing books or documents before the commission or any officer designated by it on the ground that the testimony or documentary or other evidence required of him

may tend to incriminate him or subject him to a penalty or forfeiture; but that no individual shall be prosecuted for or on account of any transaction, matter or thing about which he is compelled to testify, after having claimed his privilege against self incrimination. The burden rested upon appellant to prove that he was served with process requiring him to appear and produce certain books and records relating to the subject matter of the prosecution, that he claimed his immunity against self incrimination, and that despite such claim he was required to testify concerning his identity and relationship to the trusts and organizations referred to in the indictment. The record fails to indicate that any evidence was offered to sustain these allegations of fact. And in the absence of such evidence the plea was properly denied." (Citing, *Lee v. United States*, 91 F. (2d) 326, cert. denied 302 U. S. 745, 58 S. Ct. 263, 82 L. Ed. 576, and other cases.)

The Supreme Court, however, in the opinion by Mr. Justice Reed, page 567 of 85 L. Ed., said:

"It is next urged that the plea was properly overruled because of petitioner's failure to prove its allegations. (citations.) Such result is assumed to follow on the theory that as the burden was on petitioner to prove his plea, the failure of the record to show an offer of proof justifies the order. As appears from the preceding statement of the case, the trial court overruled not only the plea in bar but petitioner's motion for production of the transcript, which was certainly the best evidence of whether the testimony before the commission was sufficiently related to the prosecution to support amnesty. In the Martin case (citations), this Court said the action dismissing a traversed motion for failure of proof would have

been reversed if the opportunity to establish the facts by evidence had been denied the accused. *Treating the Government's motion to strike the plea in bar as a traverse of that pleading which would justify the order overruling it in the absence of a showing in the record of an offer of proof,* that result does not follow where, as here, the plea is accompanied by a motion for the production of the transcript of the former evidence. The plea and motion showed that application had previously been made to the Securities and Exchange Commission for the transcript and had been refused." (Italics added.)

The burden to prove the facts was upon the appellant and lack of evidence entitled the Government to an overruling of the plea. (*Kastel v. United States* (C. C. A. 2), 23 F. (2d) 156.) Verified pleadings are not evidence in support of the motion. (*Martin v. Texas,* 200 U. S. 316, 50 L. Ed. 497, 26 S. Ct. 338.)

In the case at bar, the Government traversed the plea in abatement by its motion to strike [R. 90] and the order of the District Court [R. 96] overruling the plea was justified, as the record discloses a complete absence of an offer of proof upon the part of appellant.

(b) The Production by Consolidated Mines of California of Its Books and Records Under the Compulsion of a Subpoena Granted No Immunity to Appellant.

It was only after the decision of this Court in the case of *Consolidated Mines of California, et al. v. Securities and Exchange Commission,* 97 F. (2d) 704, decided June 30, 1938, that the books and records of the corporation were in fact produced.

There can be no question but that the books and records of the corporation may be produced under the compulsion of a subpoena and used as evidence against an officer or agent thereof. (*Brown v. United States,* 276 U. S. 134, 142, 48 S. Ct. 288, 72 L. Ed. 500; *Schenck v. United States,* 249 U. S. 47, 50, 39 S. Ct. 247, 63 L. Ed. 470.)

The same rule has been applied as to the books and records of unincorporated associations. (See *Davis, et al. v. Securities and Exchange Commission* (C. C. A. 7), 109 F. (2d) 6, cert. denied 309 U. S. 687, 60 S. Ct. 889, 84 L. Ed. 1030.

(c) Section 22(c) of the Securities Act of 1933, Insofar as it Requires a Person to Claim His Privilege, After He Is Called and Asked to Testify, Is Constitutional and Is Not in Violation of the Fifth Amendment to the Constitution of the United States.

No voluminous citation of authority is necessary to sustain this proposition.

This Court in *Coplin, et al. v. United States,* 88 F. (2d) 652, cert. denied 301 U. S. 703, 57 S. Ct. 929, 81 L. Ed. 1357, has declared the Act constitutional.

Section 22(c) was assumed to be valid in *Edwards v. United States,* 312 U. S. 473, 61 S. Ct. 669, 85 L. Ed. 563; *Davis, et al. v. Securities and Exchange Commission* (C. C. A. 7), 109 F. (2d) 6, cert. denied 309 U. S. 687, 60 S. Ct. 889, 84 L. Ed. 1030.

(d) The District Court Properly Ruled That There Was No Issue to be Determined by a Jury as to Whether Appellant Was Entitled to Immunity.

The record clearly discloses that there was no question of fact to be decided by a jury in connection with the attendance of appellant before the examiner of Securities and Exchange Commission [R, 99-100]. The admitted facts are that appellant appeared voluntarily and voluntarily testified.

The correct rule in regard to trial of preliminary issues by a jury is stated in Housel and Walser, *Defending and Prosecuting Federal Criminal Cases* (1938), in #337:

> "After a plea in abatement or in bar is interposed the Court usually sets a date for a hearing thereon. If no questions of fact arise, a plea in abatement or in bar is disposed of by the Court (Bassett v. U. S., 9 Wall. (76 U. S.) 38, 19 L. ed. 548; U. S. v. Peters, 87 F. 984, aff'd 94 F. 127); and even if questions of fact are presented the Court generally determines the issues itself, although it may in its discretion summon a jury to assist it. (Jones v. U. S., 179 F. 584.)"

Some courts have put the preliminary issue to the same jury that decided the ultimate issue of guilt. However, these cases, and the cases cited by appellant, in which preliminary questions were put to a jury, do not hold that such procedure is mandatory. In view of the above statement that such juries are discretionary and advisory only, the fact that they have occasionally been used does not determine that every defendant is entitled to a jury on preliminary questions.

The discretionary and advisory aspect of these juries is illustrated by the case of *Thompson v. United States,* 155 U. S. 271, 39 L. Ed. 146, 15 S. Ct. 73, in which the judge instructed the jury to find *against* the defendant on the preliminary issues. If the defendant had been entitled to a jury trial, including all the incidents connected with a common law jury, the judge could not have instructed the jury to find *against* the defendant. The fact that he did so instruct indicates that the jury trial on the preliminary issues was not the ordinary trial by jury to which a defendant is constitutionally entitled on the ultimate fact of his guilt in a criminal trial. The common law jury is entitled to find all facts necessary for the crime, even though they are not disputed. (*People v. Marendi,* 107 N. E. 1058, 213 N. Y. 600.)

The District Court correctly held that as there was no issue of fact in controversy, there was nothing to be submitted to a jury.

III.

Appellant Cannot Here Question the Sufficiency of the Evidence as No Exception Was Taken to the Overruling of the Motion to Dismiss, at the Conclusion of the Government's Case, Nor Was Such Motion at Any Time Thereafter Renewed by Appellant.

It is now the established rule, notwithstanding the provisions of Title 28, U. S. C., Section 391 [Appendix, p. 6], that the Appellate Court will not decide the question of the sufficiency of the evidence in the absence of a request for an instructed verdict, unless it is satisfied that there has been a miscarriage of justice. See an elaborate analysis of the rule and of Title 28, U. S. C., Section 391, by Judge Munger in *Feinberg v. United States* (C. C. A. 8), 2 F. (2d) 955.

This Court has so held.

See,

Paine, et al. v. United States, 7 F. (2d) 263;
Fasulo v. United States, 7 F. (2d) 961;
Pawley v. United States, 73 F. (2d) 907.

While no exception in the case at bar was taken to the overruling of the motion to dismiss, at the conclusion of the Government's case, this Court has held that notwithstanding such an exception, the point is waived if the defendant puts on evidence in his own behalf after the close of the Government's case and fails to renew his motion for a directed verdict.

Steffen v. United States, 293 F. 30;
Fasulo v. United States, 7 F. (2d) 961;
Marron, et al. v. United States, 8 F. (2d) 251;
Heskett, et al. v. United States, 58 F. (2d) 897.

In *Sharples Separator Co. v. Skinner*, 251 F. 25, 27, the late Judge Gilbert, of this Court, said:

> "The defendant at the close of the testimony having made no motion for an instructed verdict, on the ground of the insufficiency of the evidence to sustain a verdict against it, we are precluded from considering any questions other than the rulings of the trial Court in excluding or admitting evidence, and in giving or refusing instructions to the jury."

The facts herein differ from those in the reported cases, where, to prevent a miscarriage of justice, due to the negligence, ignorance or inadvertence of counsel, the rights of the accused were not properly safeguarded. The outstanding professional ability and character of counsel, C. C. Montgomery, Esquire, appointed by the District Court to represent appellant in the trial in the District Court, are well known to this Court.

However, it will be noted herein that the argument of appellant (opening brief, pp. 30-42) that the evidence herein is insufficient, is unsound.

(a) The Burden Is Upon the Appellant to Establish an Exemption From the Provisions of Section 5(a)(2) of the Securities Act of 1933. No Such Exemption Was Established.

Appellant states that the certificates of stock of Consolidated Mines of California, which were mailed to the investors named in Counts 14, 15 and 16, were issued from stock certificate No. 716 of the corporation which, prior to re-issue, had been registered upon the corporate records in the name of Frank S. Tyler. The prior registration in the name of Tyler, however, is immaterial to the issues in this case.

The witness Jacobson was called by the Government as its witness. He was later recalled as a witness by the defense.

Appellant (opening brief, pp. 31-32) quotes the testimony of this witness to the effect that the certificates mailed to the investors named in the foregoing counts, in fact, came from "private stock."

It is fundamental that a party is bound by the testimony of his witness as to the facts upon which the witness has properly testified. Conclusions volunteered by the witness, however, do not come within the established rule and, in fact, are not part of the evidence in the case and could be properly stricken from the record.

The argument of appellant, however, as to the interpretation of Section 4(1) [Appendix, p. 3] of the Act, as applied to the so-called "personally or privately owned stock" of Frank S. Tyler, cannot be sustained. That section provides:

> "The provisions of section 5 shall not apply to any of the following transactions:

> "(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the first date upon which the security was *bona fide* offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter."

As disclosed by the record, Consolidated Mines of California was the *alter ego* of appellant who entirely dominated and controlled the corporation. Tyler was the employee of appellant and both Tyler and appellant participated in the distribution of the stock of the corporation. A portion of the proceeds from the sale of the stock of the corporation was used for the benefit of the corporation and furthering its alleged mining activities. The investors named in Counts 14 and 15 of the indictment, through their negotiations with *appellant,* purchased stock of Consolidated Mines of California which was immediately available to them by re-issue from stock then registered in the name of Tyler.

Clearly, if Tyler or appellant or both of them, under the facts, were an issuer, underwriter or dealer, the exemption afforded by Section 4(1) [Appendix, p. 3] of the Act was not available to them or either of them.

In *Landay v. United States* (C. C. A. 6, 1939), 108 F. (2d) 698, 704, in affirming a conviction of corporate officers for violation of Section 5 of the Securities Act of 1933, the corporation not being indicted, the Court said:

> "Appellants, therefore, who are clearly shown to have caused the issuance of this stock, fell within the sweeping provision of the first clause, which applies the penalty of the statute to 'every person who issues or proposes to issue any security.' As appellants by voting their shares of stock in a block completely dominated the corporation, the acts of the corporation were their individual acts (*McCandless, Receiver, v. Furland*, 296 U. S. 140, 165, 56 S. Ct. 481, 80 L. Ed. 121), and they are issuers within the meaning of the statute."

Appellant, however, seeks to construe Section 4(1) of the Act as though it exempted from the provisions of Section 5(a) all activities of any person other than an issuer, underwriter, or dealer. This is not, however, what Section 4(1) either states or means. The exemption is limited to "transactions" by any person other than an issuer, underwriter, or dealer. It thus leaves subject to the Act all activities, no matter by whom carried out, which are part of a transaction of sale by an issuer. The exemption applies only when the activities are not part of such a transaction, as, for example, ordinary trading transactions between individual investors. Appellant's construction of Section 4(1) is clearly contrary to the Congressional purpose. The aim of the Act as a whole is to require disclosure of material facts concerning securities when they are the subject of distribution by an issuer or controlling stockholder; it imposes no registration requirement when the securities are the subject of ordinary

sales between individual investors. Section 4(1) draws the line of distinction by exempting from the registration procedure transactions which are not customarily a part of the distribution process, that is, transactions in which neither an issuer, an underwriter, nor a dealer (selling during the period of distribution) takes part. But the section does not, and was not intended to (see House Report No. 85, 73d Congress, First Session, page 15, which stated on the bill which became the Securities Act of 1933, with respect to Section 4(1):

> "Paragraph (1) broadly draws the line between *distribution* of securities and *trading* in securities, indicating that the Act is, in the main, concerned with the problem of distribution as distinguished from trading."

grant an exemption to any person performing an essential function to the distribution of securities by an issuer.

Appellant (and Tyler) were clearly in the position of underwriters as defined by the Securities Act. Section 2(11) [Appendix, p. 2] of the Act defines "underwriter" as "any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking . . ."

In the case at bar Tyler, dominated and controlled by Shaw, "purchased from the issuer with a view to distribution." Distribution was made with appellant participating in the undertaking. Both, therefore, are underwriters within the meaning of the Act. Or, if it may be contended that Tyler alone was the underwriter, then appellant is equally liable as an aider and abettor or as a participant in the cause of action. (See *Coplin v. United*

States (C. C. A. 9), 88 F. (2d) 652, 660, 661; also *Shreve v. United States* (C. C. A. 9), 103 F. (2d) 796, 813.)

Under Section 2(11), appellant and Tyler were underwriters since they sold "for an issuer in connection with the distribution." It was through their solicitation of offers to buy that a distribution of the stock of Consolidated Mines of California was effected. As heretofore stated, the record is clear that at least a portion of the money received by appellant from the sales of the Consolidated Mines of California stock was in fact used by the corporation. (See *Securities and Exchange Commission v. Chinese Consolidated Benevolent Association, Inc.* (C. C. A. 2), 120 F. (2d) 738 (cert. ....., 86 L. Ed. 68, 62 S. Ct. 106).)

Appellant states (opening brief, p. 41) there was no public offering of the stock of Consolidated Mines of California. The facts, as disclosed by the record herein, conclusively show that the offering in fact, was public, and interstate. The holding of this Court in *Securities and Exchange Commission v. Sunbeam Gold Mines Company, et al.,* 95 F. (2d) 699, is exactly contrary to the interpretation given same by the appellant and set forth at page 41 of his brief.

This Court, in the *Sunbeam* case, follows the established rule in stating that appellant, in claiming to be within the terms of exception of transactions not involving public offering, has burden to prove that he belongs to the excepted class, and that the terms of the exemption must be strictly construed against appellant.

The trial court clearly was correct in instructing the jury that:

> "The burden of showing an exemption from registration, if exemption is claimed, rests on the defendant."

This instruction did not alter the burden upon the Government to prove appellant guilty beyond a reasonable doubt, or place any burden of proof on the defendant contrary to the principles of criminal law. This instruction merely placed the onus of showing an exemption, if one was claimed. It meant no more than that the Government had stated a complete case without negativing the availability of exemptions unless they were claimed.

In *Merritt v. United States* (C. C. A. 9), 264 F. 870 (reversed on confession of error, 255 U. S. 579, 65 L. Ed. 795, 41 S. Ct. 375) this Court said (p. 875):

> "Error is said to have been committed because there was no evidence introduced by the government in support of the negative allegations of the indictment. There was no error in this respect, for, after the evidence of the prosecution, it devolved upon the defendant on trial to introduce evidence which would bring him within the exceptions of the provisions of the statute."

Clearly, appellant does not come within the exemptions afforded by Section 4(1).

(b) The Evidence That the Mailing of the Certificates of Stock Was in the Regular Course of Business of Appellant and Under His Direction Was Sufficient.

Appellant contends there was no showing that appellant caused the mailing of the stock certificates described in Counts 14, 15 and 16. This contention ignores the evidence. The record reveals that stenographers, chosen and employed by appellant, as a regular part of their duties and in the regular course of business, prepared correspondence dictated by appellant and others in the office of appellant directed to prospects and to stockholders of Consolidated Mines of California; that they prepared circular and form letters, and forwarded stock certificates or other things of "value" by registered mail.

Dr. Arnold, the investor witness named in Count 14, testified that he was the physician for appellant and as a result of discussions with appellant, ordered 250 shares of stock of Consolidated Mines of California. Shortly after placing this order with appellant, Dr. Arnold received his stock certificate through the United States mails.

Regina Woodruff, the investor witness named in Count 15, had previously purchased Monolith stock through the office of appellant. She called the office of Consolidated Mines of California and, after she was unable to speak with Mr. Tyler, was told she could talk with Mr. Shaw. As a result of the telephone conversation, she placed her order for the stock of Consolidated Mines of California and thereafter duly received her certificate through the United States mails.

The record is silent regarding the individual with whom investor witness Eva M. Goodrich, named in Count 16,

had her transactions which resulted in the receipt by her through the United States mails of a stock certificate. For the purpose of this appeal, it is unnecessary to consider the sufficiency of the evidence of mailing in connection with Count 16. Clearly, the evidence of mailing is sufficient as to the transactions had with the investors named in Counts 14 and 15, and the judgment of the District Court must be affirmed if the defendant was properly convicted under any count good and sufficient in itself to support the judgment.

See:

Whitfield v. Ohio, 297 U. S. 431, 438;
Brooks v. United States, 267 U. S. 432, 441;
Abrams v. United States, 250 U. S. 616, 619;
Evans v. United States, 153 U. S. 584, 595;
Claassen v. United States, 142 U. S. 140, 146;
Gantz v. United States (C. C. A. 8), decided April 28, 1942.

This Court has held that the mailings were properly received in evidence.

See:

Shreve, et al. v. United States (C. C. A. 9), 103 F. (2d) 796;
Greenbaum, et al. v. United States (C. C. A. 9), 80 F. (2d) 113.

See, also:

Gantz v. United States (C. C. A. 8), decided April 28, 1942.

IV.

The Action of the Corporation Commissioner of the State of California in Issuing a Permit or Permits to Consolidated Mines of California, a California Corporation, to Issue Its Stock Is Immaterial and Irrelevant in a Prosecution for Violation of the Provisions of Section 5(a)(2) of the Securities Act of 1933.

Throughout appellant's brief and the supplement thereto appellant contends that the issuance, by the Corporation Commissioner of the State of California, of a permit for the issuance of stock of Consolidated Mines of California, provided a full and fair disclosure of the character of the stock sold, and an implied approval thereof, and that apparently, there was no duty upon the part of appellant or Consolidated Mines of California, to comply with the provisions of the Securities Act of 1933; that the issuance of such permit by a State official in fact nullified the provisions and the requirements of the Federal legislation. The contention answers itself.

The Securities Act of 1933 followed the enactment of what has generally been called the Blue Sky Laws of the various States, and the ingenuity and fertility of resources of those dealers in securities who deliberately attempted to avoid their application supplied the background of experience against which this legislation was written. Congress has the power to refuse the use of the mails to those conducting an unlawful intrastate enterprise, even where the offense is local and subject only to State prosecution. (*Securities and Exchange Commission v. Crude Oil Corporation of America, et al.* (C. C. A. 7), 93 F. (2d) 844, 847, 849.)

(a) The Power to Regulate Commerce and the Use of the Mails Remains Free From Restrictions and Limitations Arising or Asserted to Arise by State Laws.

It is unquestioned that Congress is not fettered by State law in the regulation of the instrumentalities of interstate commerce. In *United States v. Delaware and Hudson Company,* 213 U. S. 366, 29 S. Ct. 527, 53 L. Ed. 836, at page 405 of the United States Report, the Supreme Court said:

> ". . . The power to regulate commerce possessed by Congress is, in the nature of things, ever-enduring, and therefore the right to exert it today, tomorrow, and at all times in its plenitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate."

See, also:

In re Community Power & Light Company (D. C. N. Y.), 33 F. Supp. 901.

In *United States v. Bogy* (D. C. Tenn.), 16 F. Supp. 407, the indictment under Section 17(a) of the Securities Act was challenged on the ground that "the incidental use of the mails in a transaction of the sale of securities does not bring within the power of Congress authority and control of the sale of such securities." The indictment was found valid, the case was affirmed on appeal (C. C. A. 6), 96 F. (2d) 734, and certiorari was denied, 305 U. S. 608, 83 L. Ed. 387, 59 S. Ct. 101.

Appellant (opening brief, p. 21) quotes from the opinion of the Court in *Electric Bond & Share Company v. Securities and Exchange Commission,* 92 F. (2d) 580, 586, as follows:

> "A holding company whose interests and business are predominantly intrastate need not register even though it makes use of the mails and the channels of interstate commerce."

Appellant then states:

> "It will thus be seen that the purpose of the Securities and Exchange Act is to regulate the flow of securities in interstate commerce and the use of the mail facilities in that respect, and that a company whose business is predominantly intrastate need not register even though it makes use of the mails.
>
> "While the Electric Bond & Share Company case involved that of a holding company, which enactment was an amendment to the original Securities Act of 1933, it is held in the Circuit Court opinion that 'a holding company whose interests and business are predominantly intrastate need not register even though it makes use of the mails and the channels of interstate commerce.'
>
> "We have repeated this language, which we have heretofore quoted, because it fits the particular case at bar."

Appellant overlooks the fact that Public Utility Holding Company Act of 1935 (15 U. S. C. Section 79), was enacted more than two years after the effective date of the

Securities Act of 1933, is separate and distinct legislation, and is no part of Securities Act of 1933. Public Utility Holding Company Act in Sections 4(a) and 5 (15 U. S. C. Section 79d(a) and 79e) provides for the registration of holding companies with Securities and Exchange Commission. The registration provisions of Securities Act of 1933 are not before the Court in the *Electric Bond & Share Company* case, *supra.*

Appellant attempts to class the stock of Consolidated Mines of California as an exempted security, under the provisions of Section 3(11) of the Securities Act of 1933. Such section, however, is not here applicable. The record shows that solicitations and sales were made to persons resident of the State of Oregon. This fact is admitted by appellant (opening brief, p. 22). Section 3(11) specifically applies only to an intrastate distribution, in the State of incorporation.

V.

Personally Owned Stock, as Such, Is Not Exempt From the Registration Provisions of the Securities Act of 1933 and the Instruction of the Trial Court to the Jury That it Was Immaterial That the Stock Sold Was or Was Not Personally Owned, Was Correct.

Appellant contends that this Court in its decision in the case of *Consolidated Mines of California, et al. v. Securities and Exchange Commission, supra,* held that if the stock sold was "personally owned," it was not within the provisions of the Securities Act of 1933 and that such holding by this Court was the law of the case which the District Court in the trial of appellant, was bound to follow.

The decision of this Court affirmed the order of the District Court in directing the corporation and its officers to produce documentary evidence before the examiner of Securities and Exchange Commission. Appellant was not a party in that proceeding and, as he repeatedly asserts herein, was not a director nor an officer of Consolidated Mines of California. This Court said in its opinion at page 707:

> "The appellants do not deny that sales were made and solicited, or that the mails and the means and instruments of communication in interstate commerce were used for this purpose. They say, however, that the sales were made by appellant Tyler of his personally owned stock, independently of the company. The Commission had substantial evidence to the contrary. Letters soliciting sales or encouraging purchases were written on the stationery of the corporation and in some instances the signers designated

> themselves as corporate officers. The proceeds of the securities sold were in part loaned or contributed to the corporation and were used to keep the properties in operation thereby enabling more stock sales to be effected. Certainly, the facts in the possession of the Commission justified an investigation to determine whether the sales were in truth the individual transactions of Tyler, or were made on behalf or at the behest of the corporation."

Appellant places reliance upon the last sentence of the above quotation.

As set forth in the opinion of this Court, however, in the above case, Securities and Exchange Commission had ordered an investigation of the facts concerning alleged violations of the provisions of Sections 5 and 17(a) of the Act. Section 17 [Appendix, p. 4] of the Act prohibits fraudulent interstate transactions. Section 17(c) provides as follows:

> "The exemption provided in Section 3 shall not apply to the provisions of this Section."

As heretofore noted, Section 3 designates *securities* which are exempted from the provisions of the registration requirements of the Act. The provisions of Section 17 are unrelated to the registration provisions of the Act. This Court held that the investigation ordered by Securities and Exchange Commission to determine whether Sections 5 and 17(a) had been or were being violated, was justified and that it was immaterial whether or not the sales of stock were the individual transactions of Tyler or were made on behalf or at the behest of the corporation.

As appellant was not a party in *Consolidated Mines of California, et al. v. Securities and Exchange Commission,* and as the parties and the subject matter were different, any pronouncement by this Court in the earlier case was not the law of the case at bar and which the District Court was bound to follow. The "Law of the Case" is a ruling or decision once made in a particular case by an Appellate Court and, while it may be overruled in other cases, is binding and conclusive both upon the inferior court in any further steps or proceedings *in the same litigation* and upon the Appellate Court itself in any subsequent appeal or other proceeding for review. (Italics added.) (See *Standard Sewing Machine Co. v. Leslie* (C. C. A. 7), 118 F. 557, 559.

Appellant fails to name any provision of the Act which exempts "personally owned stock" from the registration provisions, because no such exemption, in fact, exists. While it may be repetitious (see p. 45 of this brief), the Act shows that "personally owned stock" is not exempt. Thus in Section 2(11) it defines the term "underwriter" to mean, among other things, "any person who has purchased from an issuer with a view to . . . the distribution of any security." It seems clear that a person who has purchased securities from an issuer and then distributes them is distributing his "personally owned stock." Section 2(11) also defines the term "underwriter" to include also a person who "sells for" an issuer in connection with the distribution of any security. The last sentence of Section 2(11) extends the definition of "underwriter" to include a person who purchases from or sells for a person who controls the issuer.

There is no merit to appellant's contention that Section 5(a) of the Securities Act is unconstitutional in so far as it attempts to restrict a person from selling personally owned stock.

The Act is constitutional (*Jones v. Securities and Exchange Commission,* 12 F. Supp. 210, aff'd, 79 F. (2d) 617, reversed on other grounds, 298 U. S. 1, 56 S. Ct. 654, 80 L. Ed. 1015; *Coplin, et al. v. United States* (C. C. A. 9), 88 F. (2d) 652, cert. denied 301 U. S. 703, 57 S. Ct. 929, 81 L. Ed. 1357.)

In the case of *Louisville & Nashville R. R. v. Mottley,* 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, the Court reviewed some of the cases bearing on the right of Congress to regulate private rights when they conflict with the public interests, and said (p. 480 of 219 U. S.):

> "There are certain propositions at the base of this inquiry which we need not discuss at large, because they have become thoroughly established in our constitutional jurisprudence. One is that the power granted to Congress to regulate commerce among the states and with foreign nations is complete in itself, and is unrestricted except by the limitations upon its authority to be found in the Constitution. *Gibbons v. Ogden,* 9 Wheat. 1; *Brown v. Maryland,* 12 Wheat. 419; *Addyston Pipe and Steel Co. v. United States,* 175 U. S. 211, 229; *Scranton v. Wheeler,* 179 U. S. 141, 162, 163; *C., B. & Q. R. R. Co. v. Drainage Com'rs.,* 200 U. S. 364, 400; *Atlantic Coast Line R. R. Co. v. Riverside Mills,* 219 U. S. 186, 202.
>
> "In the *Addyston Pipe* case, this court said that, under its power to regulate commerce, Congress 'may enact such legislation as shall declare void and prohibit the performance of any contract between in-

dividuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce'."

Again at page 228 of the *Addyston Pipe* case, ***supra,*** the court said:

"We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts.

"But it has never been, and in our opinion ought not to be, held that the word (liberty) included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce, and in violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature, while in the exercise of its constitutional right to regulate commerce among the States . . . Anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce."

Appellant queries [Supplement to opening brief, p. 14] as follows:

> "Where the only stock involved in the alleged violation was personally owned stock transferred from one owner to another and sold by the second owner, is such stock within the exemption of Section 3(10)?"

Clearly, however, this section affords appellant no relief. It provides for the exchange of one security for another security, where the terms and conditions of such issuance and exchange are approved after a hearing . . . by any . . . governmental authority expressly authorized by law to grant such approval [Appendix, p. 3]. In the case at bar, there was no "exchange" of one security for another or different security; it was a re-transfer from the alleged "personally owned stock" of Tyler to the investors. It should be noted that the issuance of the stock of Consolidated Mines of California to residents other than of the State of California, as conclusively appears from the record, was in direct violation of the terms of the permit from the Corporation Commissioner of the State of California. The California statute provides (appellant's opening brief, p. 2):

> ". . . The commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities, as therein provided, *in this state* . . ." (Italics added.)

Clearly, Section 3(10) of the Securities Act affords no exemption to the appellant herein.

VI.

The Entire Record Must Be Considered Upon This Appeal.

Appellant feebly contends (opening brief, pp. 22, 23, 41) that the entire record in this case cannot be considered with relation to the three counts upon which appellant was convicted. In support of such contention, appellant cites the case of *Dunn v. United States,* 284 U. S. 390, for the proposition that each count of an indictment is regarded as if it were a separate indictment. However, an examination of the *Dunn* case fails to disclose that the Court held that where certain evidence is presented as to each count, that evidence alone can be considered. The complete picture of the relationship of appellant with Consolidated Mines of California and with the distribution and sale of its stock was properly before the Court and admissible in support of not only Counts 1 to 13, inclusive, but also Counts 14 to 16, inclusive, of the indictment. Appellant argues that the evidence discloses he was in fact exempted from the registration provisions of the Act. Although such contention has no factual basis, nevertheless, if for no other reason or purpose, it was proper for the Government to show the relationship and connection of appellant with the distribution and sale of the stock of Consolidated Mines of California to meet any possible contention of the defendants that in fact, an exemption from registration existed. It is well settled that where an indictment charges separate offenses, where the evidence offered to sustain one count was properly admissible and relevant to sustain the other, such offenses are properly joined, as in the instant case. See *McNeil v. United States* (C. C. A. D. C.), 85 F. (2d) 698, and cases therein cited.

Conclusion.

Appellant (opening brief, pp. 61, 62) quotes the Message of the President to the Congress, March 29, 1933, as to the fundamental purpose of the Securities Act of 1933.

Such quotation concisely and exactly expresses the stand of the Government as to the transactions upon which appellant herein was convicted and from which conviction he has appealed to this Court. As the promoter of Consolidated Mines of California and as the individual completely and entirely dominating and controlling such corporation, he chose to ignore the plain provision of Section 5(a) of the Act, by failing to register the securities sold to an investing public, notwithstanding the opinions of representatives of Securities and Exchange Commission and the advice of his own counsel that registration was required.

After a full and fair trial, appellant was found guilty as charged.

It is respectfully submitted that the conviction of appellant is amply supported by the evidence and that the judgment of the District Court should be affirmed.

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APPENDIX.

Sections 2(4), (7), (8), (11), 3(a)(10), (a)(11), 4(1), 5(a), 17(a)(c), 22(c), and 24 of the Securities Act of 1933, 48 Stat. 74, as amended (15 U. S. C. Secs. 77b(4), (7), (8), (11), 77c(a)(10), (a)(11), 77d(1), 77e(a), 77q(a)(c), 77v(c) and 77x, provide as follows:

Sec. 2. When used in this title, unless the context otherwise requires—

* * * * * * * * *

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or

other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.

* * * * * * * * *

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum accompanying such statement or incorporated therein by reference.

* * * * * * * * *

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly con-

trolling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

* * * * * * * * *

Sec. 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

* * * * * * * * *

(10) Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval.

* * * * * * * * *

(11) Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory.

* * * * * * * * *

Sec. 4. The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer

(including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

* * * * * * * * *

Sec. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Sec. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * * * * * * * *

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

* * * * * * * * *

Sec. 22. (c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause, or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

* * * * * * * * *

Sec. 24. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

* * * * * * * * *

Section 269, as amended, of Judicial Code (28 U. S. C. Sec. 391), provides:

All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.